Supreme Court, U.S.
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No. 00-415

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

SWISHER INTERNATIONAL, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a taxpayer that exhausts its administrative remedies by following the refund procedure specified in the Harbor Maintenance Tax regulations of the Customs Service, and timely protests the denial of the requested refund, is entitled to judicial review of Customs' decision under the "protest" jurisdiction of the Court of International Trade, 28 U.S.C. § 1581(a).

RULE 29.6 DISCLOSURE

Respondent Swisher International, Inc. has no parent corporation nor any publicly held company owning 10% or more of its stock, and has no subsidiaries or affiliates that have issued shares to the public.

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This case concerns the administrative details of the refunds of Harbor Maintenance Tax ("HMT") required by the Court's recent decision in *United States v. United States Shoe Corporation*, 523 U.S. 360 (1998), which held the tax on exports to be unconstitutional. The government asks the Court to review which subsection of 28 U.S.C. § 1581 confers jurisdiction on the Court of International Trade ("CIT") to award refunds under the specific fact pattern presented in this case. In *U.S. Shoe*, the government excluded similar jurisdictional issues from the scope of its petition for certiorari, on the ground that they were too insignificant to warrant this Court's review. The government expressly stated in that petition that the jurisdictional basis for awarding HMT refunds was an issue "peculiar to the refund requests of exporters under the Harbor Maintenance Tax" that "lacks recurring application in other contexts." Pet. for Writ of Cert. at 7 n.2, *U.S. Shoe*. Nevertheless, evidently concerned about the magnitude of the refunds now required to implement the constitutional ruling of *U.S. Shoe*, the government seeks review of equally narrow, fact-bound issues here.

The government's statements in its *U.S. Shoe* petition concerning the narrowness of jurisdictional issues under the HMT were correct, and its inconsistent claims here are erroneous. The exclusive jurisdiction of the CIT and the Federal Circuit over challenges to the HMT ensures that no conflict among the circuits can arise. Moreover, the jurisdictional basis for a finite number of lawsuits, seeking refunds of a tax that is no longer being collected, is not an issue of recurring importance in customs law, much less in other contexts. The decision below is also perfectly consistent with *U.S. Shoe*; the difference in jurisdictional bases between that case and this one is not a conflict, but instead simply stems from the fact that Respondent Swisher International, Inc. exhausted its administrative remedies, whereas the exporter in *U.S. Shoe* did not. Review by this Court therefore is not warranted.

REGULATORY PROVISION INVOLVED

In addition to the statutory provisions set forth in the government's petition, this case involves the regulation that previously governed collection and refund of the Harbor Maintenance Tax on exports.[1] 19 C.F.R. § 24.24 (1998) provided in relevant part:

> (e) *Collections*
>
> * * *
>
> (2) *Export vessel movements*—(i) *Time and place of liability.* Subject to the exemptions and special rules of this section, when cargo is loaded on a commercial vessel for export at a port within the definition of this section, the exporter of that cargo (the name that appears on the SED or equivalent document authorized under 15 CFR 30.39(b)) is liable for the payment of the port use fee at the time of loading. The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation. The SED or equivalent documentation is to be completed and submitted in accordance with the procedures set forth in § 4.63 of this chapter and 15 CFR part 30.
>
> (ii) *Fee payment.* The exporter whose name appears on the SED or equivalent documentation shall pay the accumulated fees on a quarterly basis in accordance with paragraph (f) of this section by mailing a check or money order payable to the U.S. Customs Service

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[1] The HMT regulation has been amended to remove the provision concerning the HMT on exports, 19 C.F.R. § 24.24(e)(2) (1998). *See* T.D. 98-64, 63 Fed. Reg. 40,822, 40,823 (1998). Citations in this brief are to the April 1, 1998 edition of the Code of Federal Regulations, which contained the version in effect at the time this action was filed.

for all fees for which he is liable for the quarter to U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673-0915. Accompanying the payment shall be either a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, or if the exporter files Automated Summary Monthly Shipper's Export Declarations with the Bureau of the Census in accordance with Foreign Trade Statistics Regulations (15 CFR 30.39), a cover letter identifying the exporter, his exporter identification number (EIN), Census Bureau reporting symbol and the quarter for which the payment is being made.

* * *

(5) *Refund and supplemental payment.*

Where a refund is requested or supplemental payment is made, a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, should be mailed to the U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673-0915, along with a copy of the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) in which the refund is requested or supplemental payment is made.

(f) *Quarterly payments.* All quarterly payments required by this section must be received no later than 31 days after the close of the quarter being paid. Quarterly periods end on the last day of March, June, September, and December.

STATEMENT OF THE CASE

U.S. Shoe established the government's liability for return of unconstitutionally exacted HMT on exports. Respondent Swisher exhausted Customs' administrative remedies for HMT refunds before filing suit. However, with the goal of minimizing the amount of HMT it must refund, the government now seeks Supreme Court review to establish that its own administrative remedies were unavailable to Swisher. Proper understanding of this issue requires more detail than the government's petition provides as to the basis of the CIT's jurisdiction, the regulations established by Customs, and the overall history of the HMT litigation.

A. Court of International Trade Jurisdiction

The statute defining the CIT's jurisdiction to hear cases against the United States, 28 U.S.C. § 1581, creates a number of routes to judicial review of Customs Service actions. Subsections (a) and (i) of the statute are at issue here.

1. Protest Jurisdiction Under Section 1581(a)

The most common form of judicial review of a Customs Service decision occurs under the CIT's "protest" jurisdiction. The practice of requiring taxpayers to exhaust administrative remedies by protesting Customs Service decisions at the agency before seeking judicial review dates to the earliest days of the Republic.[2] Congress eventually codified this protest requirement, and provided a mechanism for judicial review of the Customs Service's decision on the protest.

In its current form, the protest statute provides that "decisions of the Customs Service, including the legality of all orders and findings entering into the same," as to a variety of

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[2] *See generally United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1552 (Fed. Cir. 1997) (discussing origin of the protest procedure).

enumerated matters will be considered "final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade . . . ." 19 U.S.C. § 1514(a). The "decisions" subject to protest include decisions as to "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." *Id.* § 1514(a)(3). The taxpayer has ninety days from the date of the Customs Service decision to file such a protest. *Id.* § 1514(c)(3). If Customs denies the protest, the taxpayer may seek judicial review in the CIT, which has exclusive jurisdiction over such actions under its "protest" jurisdiction. 28 U.S.C. § 1581(a). The applicable statute of limitations requires filing suit within 180 days of the protest denial. *Id.* § 2636(a). The CIT's protest jurisdiction routinely has been invoked in cases challenging customs charges and exactions on constitutional grounds, both in the CIT and in its predecessor courts.[3]

2. Residual Jurisdiction Under Section 1581(i)

In addition to specific grants of jurisdiction over the matters detailed in sections 1581(a) through 1581(h), section 1581(i) also grants the CIT broad residual jurisdiction over actions arising under the statutes governing import transactions. *See* 28 U.S.C. § 1581(i). Such a lawsuit must be filed within two years of when "the cause of action first accrues."

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[3] *See, e.g., F.W. Myers & Co. v. United States*, 615 F. Supp. 569, 570 (Ct. Int'l Trade 1985) (invoking section 1581(a) jurisdiction in case raising constitutional issue through timely protest); *Erie Navigation Co. v. United States*, 475 F. Supp. 160 (Cust. Ct. 1979) (Fifth Amendment challenge to vessel repair duty statute); *Tuscany Fabrics, Inc. v. United States*, 317 F. Supp. 741 (Cust. Ct. 1970) (Fifth Amendment challenge to tariff statute), *aff'd*, 454 F.2d 1188 (C.C.P.A. 1972).

28 U.S.C. § 2636(i). Congress did not intend this residual jurisdiction, which was first created in 1980, to encompass causes of action that were the traditional and exclusive province of protest jurisdiction, nor did Congress intend to create new causes of action under section 1581(i). Instead, section 1581(i) was intended to confirm CIT jurisdiction over a class of cases arising out of import transactions and involving the international trade laws, which plaintiffs had erroneously been commencing in the district courts.[4] The Federal Circuit has held that because of its residual character, section 1581(i) generally may not be invoked when one of the more specific jurisdictional provisions (*i.e.*, sections 1581(a) through 1581(h)) applies.[5]

B. The *U.S. Shoe* Litigation

The CIT designated *U.S. Shoe* as a test case on the constitutionality of the HMT on exports, staying this action and the other pending challenges in the CIT.[6] The government and the taxpayer in *U.S. Shoe* agreed that the CIT, rather than some other court, was the proper forum to hear challenges to the HMT. However, they disagreed sharply as to the basis of the CIT's jurisdiction. The government argued that the CIT had jurisdiction only under section 1581(a), and only to the extent that the exporter had properly protested its payment.

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[4] *See United States v. Bar Bea Truck Leasing Co.*, 713 F.2d 1563, 1566 (Fed. Cir. 1983) (quoting H.R. Rep. No. 96-1235, at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758).

[5] *Miller & Co. v. United States*, 824 F.2d 961 (Fed. Cir. 1987).

[6] *See United States Shoe Corp. v. United States*, 19 Ct. Int'l Trade 288 (1995). Similar challenges were filed in two other courts—the CIT and the Court of Federal Claims. *See United States Shoe Corp. v. United States*, 114 F.3d 1564, 1567 n.2 (Fed. Cir. 1997) (noting pendency of one district court action as well as numerous CIT and Court of Federal Claims cases).

See United States Shoe Corp. v. United States, 907 F. Supp. 408, 418 (Ct. Int'l Trade 1995). The protestable "decision," the government argued, was "Customs' decision to accept payment" of HMT. *Id.* Under the government's theory, if the exporter did not file a protest within ninety days of the *payment* of the tax, it would be barred from ever recouping that payment, because it would have missed the deadline for a protest set forth in 19 U.S.C. § 1514(a). The *U.S. Shoe* taxpayer, by contrast, argued for jurisdiction under section 1581(i), under which no protest was required. The statute of limitations applicable to actions under section 1581(i) allowed recovery of tax paid within two years of filing the lawsuit. 28 U.S.C. § 2636(i).

A special three-judge panel of the CIT agreed with the parties that the CIT was the proper forum to adjudicate constitutional challenges to the HMT. 907 F. Supp. at 411. As for the basis of its jurisdiction, the CIT rejected the government's theory that receiving payment of HMT was an affirmative "decision" that could be protested and then reviewed in the CIT under section 1581(a). The court concluded that there was no Customs Service "decision" at all under the facts of *U.S. Shoe*. In the absence of a decision, there was nothing to protest, and hence there could be no jurisdiction under section 1581(a).[7] The CIT therefore held that its jurisdiction arose under section 1581(i). 907 F. Supp. at 419-21. The CIT also held that the HMT violated the Export Clause of the Constitution. *Id.* at 418. On appeal, a five-judge panel of the Federal Circuit affirmed the CIT's

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[7] As a protective measure, the taxpayer in *U.S. Shoe* had also filed a "protest" within ninety days of payment of the tax, in case the court accepted the government's jurisdictional theory. *See* Br. for U.S. at 7-8 n.3, *U.S. Shoe*; Br. for Resp't, at 4 n.2, *U.S. Shoe*. Because there was no protestable "decision," this attempted "protest" was not valid.

holding that the HMT was unconstitutional, and that jurisdiction was proper under section 1581(i). *United States v. United States Shoe Corp.*, 114 F.3d 1564 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998).

In *U.S. Shoe*, the government petitioned for certiorari on the constitutional issue only, and expressly declined to seek review of the Federal Circuit's holding that jurisdiction arose under section 1581(i). Pet. for Writ of Cert. at 7 n.2, *U.S. Shoe*. The jurisdictional issue, said the government, "has no relevance to the proper disposition of this case," and is "peculiar to the refund requests of exporters under the Harbor Maintenance Tax and lacks recurring application in other contexts." *Id.* The Court granted certiorari only on the constitutional question, and the parties made only passing references to the CIT's jurisdiction in footnotes to their briefs.[8]

Before proceeding to affirm the Federal Circuit's decision on the constitutional issue, this Court briefly observed that "the CIT properly entertained jurisdiction in this case." *U.S. Shoe*, 523 U.S. at 365. The Court confirmed that the CIT has "exclusive jurisdiction over challenges to the HMT," and that "the Court of Federal Claims lacks jurisdiction over

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[8] *See* Br. for U.S. at 7-8 n.3, *U.S. Shoe*; Br. for Resp't at 4 n.2, 34 n.44, *U.S. Shoe*. Although the parties did not dispute the CIT's jurisdiction over the case, a group of *amici curiae*, led by Arctic Cat, Inc., filed a brief in this Court challenging CIT jurisdiction. *See* Mot. and Br. of Arctic Cat, et al., as *Amicus Curiae* in Support of Neither Party and Suggesting Lack of Jurisdiction, *U.S. Shoe*. However, the Arctic Cat *amici* did not discuss the differences between sections 1581(a) and 1581(i); rather, they raised the more fundamental question whether the CIT had jurisdiction *at all*. The Arctic Cat *amici* argued that exclusive jurisdiction to award HMT refunds lay in the Court of Federal Claims under the Tucker Act. *Id.* at 4. The parties briefly addressed Arctic Cat's argument regarding the Court of Federal Claims in their briefs. Br. for Resp't at 34 n.44, *U.S. Shoe*; Reply Br. at 18 n.8, *U.S. Shoe*.

the challenges to the HMT currently pending there." *Id.* at 366 n.3. The Court stated that because the Customs Service had issued no decision to the *U.S. Shoe* plaintiff, but " 'merely passively collect[ed]' HMT payments," no protest could have been filed. *Id.* at 365. Accordingly, jurisdiction did not arise under section 1581(a), but rather under section 1581(i). *Id.* at 366.

C. The Administrative Proceedings Below

The present case arose through a very different administrative process from that in the *U.S. Shoe* litigation. Rather than proceed directly to court, Respondent Swisher first exhausted its administrative remedies under the Customs Service regulations governing the refund of HMT. The remedies that Swisher pursued led first to a Customs Service decision denying requests for tax refunds, and then to Customs' denial of a protest regarding that decision. Swisher then filed suit, seeking judicial review of Customs' decision to deny the refunds.

Pursuant to the congressional authorization to establish appropriate administrative procedures to implement the HMT, 26 U.S.C. § 4462(i), the Customs Service created a procedure under which an exporter was liable for HMT at the time it loaded the cargo, but was not required to pay the HMT until the end of the quarter. 19 C.F.R. § 2424(e)(2). The procedures required submitting quarterly payments within 31 days of the close of the quarter, accompanied by a tax return. 19 C.F.R. § 24.24(e)(2), (f). The exporter could seek a refund of HMT by filing an amended tax return. 19 C.F.R. § 24.24(e)(5). Neither the HMT refund regulation nor the amended tax return form contained any time limit for requesting refunds of HMT on exports. *Id.*

Swisher paid HMT from the Fourth Quarter of 1990 through the Second Quarter of 1994. Pet. App. 4a. In September 1994—at approximately the same time United States

Shoe Corporation filed suit seeking recovery of HMT—Swisher instead exhausted its administrative remedies by filing a series of amended tax returns with Customs, requesting refunds for each quarter it had paid HMT. Pet App. 4a-5a.

Customs rendered a decision denying Swisher's refund requests on October 26, 1994. Pet. App. 5a. On November 23, 1994, Swisher filed a timely protest of the denial of its refund requests, pursuant to 19 U.S.C. § 1514. Pet. App. 6a. Swisher requested accelerated disposition of the protest pursuant to 19 U.S.C. § 1515(b). Pet. App. 6a. When Customs took no action on the protest within the next thirty days, the protest was deemed denied by operation of law on March 26, 1995. 19 U.S.C. § 1515(b); Pet. App. 6a. Swisher timely filed this action in the CIT several days later, invoking that court's section 1581(a) protest jurisdiction. Pet. App. 6a.

D. The Judicial Proceedings Below

The CIT rejected Swisher's jurisdictional arguments, and held that it had jurisdiction only under section 1581(i), which limited recovery to the two years preceding the filing of the lawsuit. Pet. App. 24a-33a. On appeal, a unanimous panel of the court of appeals reversed, holding that jurisdiction under the facts of this case properly lay under section 1581(a). Pet. App. 1a-23a.

The court of appeals confirmed that, consistent with fifty years of precedent, "a decision as to a refund of a charge or exaction" is a "decision as to a charge or exaction" subject to protest under 19 U.S.C. § 1514(a)(3). Pet. App. 17a-18a (citing *Eurasia Import v. United States*, 31 C.C.P.A. 202, 211-12 (1944)). Swisher's cause of action, the court held, accrued when the protest was denied; because Swisher filed suit within the 180-day limitations period, the CIT had "protest" jurisdiction under 28 U.S.C. § 1581(a). Pet. App. 23a.

The court of appeals rejected the government's argument

that *U.S. Shoe* dictated a different result. In an opinion by the same judge who wrote the Federal Circuit's opinion in *U.S. Shoe*, the court of appeals explained that its "holding in *U.S. Shoe* that there was no protestable decision was limited to the procedural posture of that case" and did not "dictate only one possible procedure for challenging the export HMT." Pet. App. 14a. Here, Swisher had "pursued its constitutional challenge along a procedural path entirely different from that chosen by the *U.S. Shoe* plaintiff":

> Neither our decision nor that of the Supreme Court, however, reached the question of whether section 1581(a) jurisdiction would have been available had a protest been filed and denied following the filing and denial of a refund request. Thus, *U.S. Shoe* does not preclude our consideration of section 1581(a) jurisdiction in this case where a refund request and protest were, in turn, filed and denied.

Pet. App. 13a.

REASONS FOR DENYING THE PETITION

The government's petition fundamentally misperceives the significance of this case in relation to *U.S. Shoe*. The government argues that the decision below conflicts with *U.S. Shoe* because the court of appeals found a different basis for CIT jurisdiction in this case. In an opinion by the same judge who authored that court's decision in *U.S. Shoe*, the court of appeals correctly recognized that Swisher here invoked an administrative procedure that was never considered in *U.S. Shoe*, and that this exhaustion of administrative remedies gave rise to a different jurisdictional basis in the CIT. This case and *U.S. Shoe* do not conflict, nor do they create confusion as to CIT jurisdiction. Rather, taken together they simply illustrate the unremarkable proposition that different administrative procedures may provide different bases for jurisdiction in the CIT.

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *U.S. SHOE*

In the litigation over export HMT, three distinct approaches to CIT jurisdiction have emerged, only two of which were litigated by the parties in *U.S. Shoe*. In *U.S. Shoe*, the exporter challenged the government's collection of HMT by filing a suit for refund in the CIT, invoking the court's jurisdiction under section 1581(i) to claim a refund of tax collected within two years of the date of filing suit. The government argued instead in the lower courts that the exporter must protest the Customs Service's alleged "decision" to accept payment of the tax within ninety days of the payment, and then file suit under the CIT's section 1581(a) protest jurisdiction. The lower courts rejected the government's untenable theory on the ground that no Customs "decision" was involved in passively accepting payment, and the government wisely abandoned the theory in this Court. In its *U.S. Shoe* opinion, this Court confirmed that mere acceptance of the tax was not a "decision" that could lead to CIT

jurisdiction under section 1581(a). 523 U.S. at 365.

Although the court below held that the CIT had jurisdiction over this case under section 1581(a), the basis for that holding is completely different from the government's section 1581(a) theory rejected in *U.S. Shoe*. Following a Customs Service regulation that was not invoked in *U.S. Shoe*, Swisher filed requests for refunds of HMT; when the Customs Service issued a decision denying these requests, Swisher protested the decision. When Customs denied the protest, Swisher filed suit challenging that denial in the CIT. The determination that Customs had issued no decision *at all* in *U.S. Shoe*, and therefore that protest jurisdiction was not available under the facts of that case, has no bearing on this case, in which Swisher exhausted its administrative remedies under Customs Service regulations and protested a specific Customs decision. The exporter in *U.S. Shoe* challenged the passive *collection* of HMT, whereas Swisher here challenged a specific, affirmative Customs Service *decision*. Under the CIT's jurisdictional statute, these different administrative routes led to different bases for jurisdiction.

A. The Jurisdictional Question Presented In This Case Was Neither Briefed Nor Argued To This Court In *U.S. Shoe*

A central contention of the government's petition is that the Court has already considered and rejected Swisher's jurisdictional arguments in *U.S. Shoe*, and therefore that the court of appeals erred in accepting those arguments. In fact, Swisher's jurisdictional arguments were never even presented to this Court, much less rejected by it.

1. The government expressly declined to seek certiorari on the question of jurisdiction in *U.S. Shoe*, on the ground that it was an question "peculiar to the refund requests of ex-

porters under the Harbor Maintenance Tax" that "lacks recurring application in other contexts."[9] Accordingly, the Court granted certiorari only on the question of the constitutionality of the HMT; jurisdictional issues were not included in the question presented. 523 U.S. at 365.

2. In the *U.S. Shoe* proceedings in this Court, neither the parties nor any of the numerous *amici curiae* briefed the jurisdictional question presented in this case, although the government inexplicably asserts otherwise. Pet. 18-19 n.8. Accordingly, the *U.S. Shoe* briefs did not even mention requests for refunds under the HMT regulation or the protest of a decision denying such requests.[10] One of the thirteen *amicus* briefs filed in the case did argue that the CIT did not have jurisdiction *at all*, and that HMT challenges could be brought only in the Court of Federal Claims, but that brief did not argue the distinction between section 1581(a) and section 1581(i). The *U.S. Shoe* parties tersely refuted the Court of Federal Claims argument, noting that the government had not sought review of the determination that CIT jurisdiction arose under section 1581(i) rather than 1581(a).[11]

Not surprisingly, the jurisdictional question presented here was not addressed at oral argument in *U.S. Shoe*. Neither were the jurisdictional arguments pursued by the parties below in that case. The sole reference to jurisdiction concerned whether cases pending in the Court of Federal Claims

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[9] Pet. for Writ of Cert. at 7 n.2, *U.S. Shoe*.

[10] Indeed, the parties and the *amici* did not even brief the two jurisdictional arguments considered by the lower courts in *U.S. Shoe*. The parties only referred to their prior positions in footnotes. *See* Br. for U.S. at 7-8 n.3, *U.S. Shoe*; Br. for Resp't at 4 n.2, 34 n.44, *U.S. Shoe*.

[11] *See* Mot. and Br. of Arctic Cat, et al., as *Amici Curiae* in Support of Neither Party and Suggesting Lack of Jurisdiction, *U.S. Shoe*; Br. for Resp't at 34 n. 44, *U.S. Shoe*; Reply Br. at 18 n.8, *U.S. Shoe*.

could be transferred to the CIT. *U.S. Shoe*, Transcript, 1998 WL 102578 at *32-33 (Mar. 4, 1998).

3. In its *U.S. Shoe* opinion, the Court did not address the jurisdictional question presented in this case. The petition nonetheless claims that "the arguments submitted by respondent were fully briefed and considered" in *U.S. Shoe*. Pet. 18-19 n.8. As noted above, the government's assertion regarding briefing is simply wrong. In addition, the citations provided in the government's petition show only that this Court considered and rejected *the government's* jurisdictional theory in *U.S. Shoe* (which assumed that collection of a tax represents a "decision"), not that it considered Swisher's completely different argument (which is premised upon exhaustion of administrative remedies). *See* Pet. 18-19 n.8 (citing 523 U.S. at 365-66).

4. The petition also inexplicably and erroneously claims that both the CIT and the Federal Circuit "rejected respondent's contentions" in *U.S. Shoe*. Pet. 15 n.5. In fact, although Swisher participated as an *amicus curiae* before both courts in *U.S. Shoe*, only the CIT (in *dicta*) reached the question presented here; the Federal Circuit's *U.S. Shoe* decision did not mention the question.[12] The citations to the

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[12] In a single paragraph of *dicta*, the CIT briefly rejected the argument of "certain *amici* [who] contend the denial of a refund request pursuant to 19 C.F.R. § 24.24(e)(5) is a protestable decision, and that subsection 1581(a) would provide the appropriate basis for jurisdiction," stating that "Customs does not have the power to decide the constitutionality of the Tax," and therefore that "protestable decisions pursuant to the refund provision of subsection 24.24(e)(5) are limited to decisions pertaining to the administration of the Tax, not its constitutionality." *U.S. Shoe*, 907 F. Supp. at 421. The CIT cited no authority for this proposition, which contradicts the familiar principle of exhaustion doctrine that even constitutional issues normally can (or must) be presented first to an

(Footnote cont'd on next page)

Federal Circuit's opinion in the government's petition again relate only to the government's jurisdictional theory, not Swisher's. *See* Pet. 18-19 n.8 (citing 114 F.3d at 1568-70). Accordingly, in its opinion below in this case, the Federal Circuit correctly stated: "Neither our decision nor that of the Supreme Court [in *U.S. Shoe*] reached the question of whether section 1581(a) would have been available had a protest been filed and denied following the filing and denial of a refund request." Pet. App. 13a.

As the CIT below properly recognized in this case, while Swisher had "participated as an *amicus curiae*" in the lower courts in *U.S. Shoe*, "as it was not a party it could not obtain a definitive disposition of its theory." Pet. App. 26a. The Federal Circuit's decision below was the first appellate decision to address the jurisdictional question presented here. That decision does not conflict with this Court's *U.S. Shoe* decision.

B. The Petition Ignores The Fundamental Differences Between This Case And *U.S. Shoe*

The court of appeals did not misread its own prior holding—and this Court's opinion—in *U.S. Shoe*. Instead, the narrow, fact-bound decision below correctly determined that this case is procedurally distinguishable from *U.S. Shoe*.

1. The government's petition erroneously confuses the jurisdictional theories raised by the parties in *U.S. Shoe* with the jurisdictional question presented in this case. The government argues that because *U.S. Shoe* rejected jurisdiction under section 1581(a), jurisdiction under section 1581(a)

(Footnote cont'd from previous page.)

administrative agency. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

must automatically be rejected here as well, under different facts. However, the holding below—that a Customs Service decision denying a regulatory refund request can be protested and then reviewed under section 1581(a)—differs significantly from the government's argument in *U.S. Shoe* that a Customs Service "decision" to accept payment of HMT was reviewable under section 1581(a).

The government therefore is simply wrong when it asserts that only "two possible routes have been proposed by the parties and considered by the courts for the recovery of customs exactions improperly imposed on exported goods." Pet. 14. In fact, although only two routes to recovery were at issue under the facts of *U.S. Shoe*, a *third* distinct route is available in the different procedural posture of this case. *See supra* at 12-13.

The government claims that this Court determined in *U.S. Shoe* "that no 'actual' and protestable 'Customs decision' is made in the agency's enforcement of the HMT on exports." Pet. 18. In fact, *U.S. Shoe* held only that no Customs Service decision had been made *in that case*, not that it was impossible for such a decision *ever* to be made regarding the HMT on exports. The Customs Service promulgated a regulation providing a mechanism for obtaining refunds of HMT, 19 C.F.R. § 24.24, which Swisher invoked. After Customs issued a decision denying the refund request, Swisher filed a timely protest. Pet. App. 15a-23a. Although the government's petition neglects to cite this regulation, the court of appeals correctly recognized that 19 C.F.R. § 24.24 created an administrative procedure not invoked by the taxpayer in *U.S. Shoe*, and thus that Swisher's jurisdictional arguments had not been considered or addressed in that case. Pet. App. 12a-13a. The taxpayer in *U.S. Shoe* challenged the collection of the HMT on exports, in a manner that did not involve any decision that could give rise to protest jurisdiction. In contrast, Swisher here sought review of a specific

Customs decision denying its refund.

The court below correctly held that its *U.S. Shoe* holding regarding lack of a protestable decision "was limited to the procedural posture of that case," and recognized that Swisher here "pursued its constitutional challenge along a procedural path entirely different from that chosen by the *U.S. Shoe* plaintiff." Pet. App 13a-14a. It is hardly surprising, and certainly does not represent a "conflict," that these different procedural paths led to different jurisdictional bases in this case and in *U.S. Shoe*.

2. The government's argument erroneously assumes that *all* challenges to the HMT must invoke the same jurisdictional basis. But unlike federal district court jurisdiction, which typically does not turn on the nature of the administrative remedies pursued prior to suit, CIT jurisdiction is expressly tied to such remedies. For example, jurisdiction under section 1581(a) is available only when a taxpayer has protested a Customs Service decision, section 1581(b) requires an administrative petition, and section 1581(h) is premised upon having requested and received a Customs Service ruling.[13] The statute of limitations varies depending upon which jurisdictional provision applies.[14]

Under this statutory scheme, the same type of Customs Service action may be subject to review under different bases

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[13] 19 U.S.C. §§ 1514, 1515 (protests giving rise to 1581(a) jurisdiction); *id.* § 1516 (petitions by domestic interested parties giving rise to 1581(b) jurisdiction); 19 C.F.R. part 177 (rulings giving rise to 1581(h) jurisdiction).

[14] *See, e.g.*, 28 U.S.C. § 2636 (a) (section 1581(a) action must be commenced within 180 days of the denial of the protest); § 2636(b) (section 1581(b) action must be commenced within 30 days of denial of petition); § 2636(i) (section 1581(i) action must be commenced within two years of accrual of the cause of action).

of jurisdiction, depending upon the nature of the administrative remedies pursued. For example, the classification of imported merchandise may be challenged through a protest of Customs' decision at the time of importation, followed by judicial review under section 1581(a).[15] Alternatively, the importer may request a pre-importation classification ruling on the same merchandise, and then challenge that ruling under section 1581(h).[16] In either case, the same substantive decision may be reviewed, but under different jurisdictional provisions that depend upon the procedural mechanism invoked.[17]

Thus, the court of appeals merely followed established customs law when it explained that *U.S. Shoe* determined only the jurisdictional basis of *that* lawsuit, not of all conceivable future suits: "Our holding in *U.S. Shoe* thus does not dictate only one possible procedure for challenging the export HMT." Pet. App. 14a.

Furthermore, the argument that jurisdiction under section 1581(a) cannot be available in *this* case because residual jurisdiction under section 1581(i) was found in *another* case, turns the concept of residual jurisdiction on its head. Because residual jurisdiction may not be "used generally to bypass administrative review by meaningful protest," juris-

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[15] *See, e.g., Pagoda Trading Corp. v. United States*, 804 F.2d 665, 667-68 (Fed. Cir. 1986).

[16] *See, e.g., Heartland By-Products, Inc. v. United States*, 74 F. Supp. 2d 1324 (Ct. Int'l Trade 1999) (CIT has jurisdiction to review classification ruling under section 1581(h) where importer shows irreparable harm).

[17] Respondent understands that the brief being filed by Totes-Isotoner, et al. as *amici curiae* includes other examples of situations in which the CIT has reviewed the same types of issues under different jurisdictional provisions, depending on the administrative remedies pursued.

diction under section 1581(i) is not available where jurisdiction in a particular case is available under sections 1581(a) through 1581(h).[18] Thus, the logical starting point for jurisdictional analysis is a determination whether sections 1581(a) through 1581(h) apply; only if they do not is jurisdiction under section 1581(i) possible.[19] But the government asks the Court to *begin* with the proposition that section 1581(i) jurisdiction *is* available, and then reason backwards to conclude that jurisdiction under sections 1581(a) through 1581(h) must *not* be available. The government cites no authority for such a novel approach to jurisdiction.

In the cases on which the government relies, a taxpayer attempted to invoke section 1581(i) residual jurisdiction to remedy its own error in failing to pursue clearcut administrative remedies that would have led to jurisdiction under sections 1581(a) through 1581(h).[20] Here, by contrast, the court of appeals correctly noted that there was widespread confusion as how to challenge the HMT, and Customs itself promulgated erroneous instructions in a Federal Register notice. Pet. App. 13a-14a. Although the refund request procedure of 19 C.F.R. § 24.24 was available to the taxpayer in *U.S. Shoe*, it was entirely appropriate under the circumstances for the

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[18] *United States v. Uniroyal, Inc.*, 687 F.2d 467, 472 (C.C.P.A. 1982).

[19] *See, e.g., Pac Fung Feather Co. v. United States*, 111 F.3d 114, 116 (Fed. Cir. 1997).

[20] *See Miller & Co. v. United States*, 824 F.2d 961 (Fed. Cir. 1987) (importer did not participate in International Trade Administration proceeding that would have given it standing to challenge outcome under section 1581(c)); *American Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546 (Fed. Cir. 1983) (importer failed to seek a pre-importation ruling which would have given rise to section 1581(h) jurisdiction); *United States v. Uniroyal*, 687 F.2d at 472 (importer failed to file timely protest which would have given rise to section 1581(a) jurisdiction).

courts to waive the exhaustion requirement, rather than require that exporter to request a refund from Customs under the regulation followed by Swisher in this case. But this limited waiver for one exporter cannot be taken to mean that another exporter like Swisher is not permitted to invoke the administrative remedies established under Customs' own regulations; as the court of appeals explained, such an interpretation "would render the refund portion of the regulation superfluous." Pet. App. 17a.

3. The government's argument also erroneously assumes that in confirming that the CIT had section 1581(i) jurisdiction in *U.S. Shoe*, this Court considered and rejected all possible bases for jurisdiction under sections 1581(a) through 1581(h)—including the jurisdictional basis found by the court of appeals here, *of which this Court was never informed through briefing or argument.* In determining whether jurisdiction could exist under sections 1581(a) through 1581(h), courts generally take the facts of a case *as a given*, rather than speculate whether other events *might* make jurisdiction available *if* they occurred.[21] The Federal Circuit below stated that *it* had not considered other theories of jurisdiction in *U.S. Shoe*, but rather that it had only rejected the government's argument that "mere *acceptance* of the exporter's payment of the HMT was a 'decision' of Customs subject to protest." Pet. App. 12a. The government implausibly assumes that in reviewing a Federal Circuit decision that had not considered other jurisdictional theories, this Court nevertheless would, without comment, have consid-

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[21] *See, e.g., Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581 (Fed. Cir. 1984) (CIT has jurisdiction under section 1581(c), even though plaintiffs could bring an action under section 1581(a) if they activated their subzones, imported oil, and protested Customs' assessment of duties).

ered and rejected such theories, even when no party or *amicus curiae* had briefed the theories or asked the Court to rule on them.

The Court's limited discussion of jurisdiction in *U.S. Shoe* appears to have been directed primarily to the only jurisdictional issue actually argued in the *U.S. Shoe* briefs—the contention of the Arctic Cat *amici curiae* that the Court of Federal Claims had jurisdiction, and that the CIT completely lacked jurisdiction, over the dispute.[22] It may have been in response to this argument that the Court in *U.S. Shoe* confirmed that "CIT jurisdiction over controversies regarding the administration and enforcement of the HMT accords with § 1581(i)(4)," and that because "the CIT has exclusive jurisdiction over challenges to the HMT," the cases pending in the Court of Federal Claims should be transferred to the CIT. 523 U.S. at 366 & n.3. The Court did *not* purport to establish a blanket rule that, on other facts, jurisdiction could not also "accord with" section 1581(a). There is no basis for concluding that this Court ever considered, much less ruled upon, Swisher's jurisdictional theory, which was not presented in *U.S. Shoe*.

C. The Decision Below Is Correct, And Summary Reversal Is Not Warranted

1. The court of appeals' determination as to the basis of CIT jurisdiction here is logical and correct. The Customs Service promulgated a regulation providing a mechanism for obtaining refunds of HMT, 19 C.F.R. § 24.24, and Swisher requested a refund in accordance with that regulation. Pet. App. 4a-5a. Customs' denial of a refund was a "decision" as to "charges or exactions of whatever character," and Swisher

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[22] *See* Mot. and Br. of Arctic Cat, et al., as *Amicus Curiae* in Support of Neither Party and Suggesting Lack of Jurisdiction, *U.S. Shoe*.

filed a timely protest, in accordance with 19 U.S.C. § 1514(a). Pet. App. 15a-23a. When Customs denied the protest, Swisher filed suit to challenge the denial of its protest. Pet. App. 6a. Not surprisingly, the court of appeals determined that this suit challenging the denial of a protest was subject to the CIT's "protest" jurisdiction, section 1581(a). Pet. App. 23a.

2. The government offers no coherent rationale as to why the straightforward jurisdictional theory upheld by the court of appeals is incorrect. The government states that "it is only decisions of the type described in 19 U.S.C. 1514(a) that support a 'protest' that may be reviewed first by the agency (under 19 U.S.C. 1515) and thereafter by the Court of International Trade (under 28 U.S.C. 1581(a))." Pet. 19. The petition catalogues these "types" of decisions as being those determining "the appraised value of merchandise," "the classification and rate and amount of duties chargeable," and "other discrete determinations that support a 'protest' under 19 U.S.C. 1514(a)." Pet. 19. But remarkably, the petition does not even *mention* the category of protestable decisions that the court below actually held to apply here—decisions as to "charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." 19 U.S.C. § 1514(a)(3). Customs' refund decision easily falls within the plain language of this provision, as the court below held.

The government concedes at the outset of the petition that the HMT was an "unconstitutional exaction." Pet. 6. And although the petition does not cite the regulation permitting exporters to obtain refunds of HMT, 19 C.F.R. § 24.24, the government also suggests that Customs made a "decision to deny a return of HMT payments." Pet. 19 n.9. The government does not explain why a "decision to deny a return" of a tax that it concedes to be an "exaction" is not a "decision as to a charge or exaction," and hence squarely within the express terms of section 1514(a), as the court of

appeals held. Pet. App. 18a. The petition obliquely suggests in a footnote that "the denial of a refund request submitted solely on constitutional grounds does *not* represent a 'decision' of any issue for which protest is authorized under 19 U.S.C. 1514." Pet. 19 n.9. However, the petition relies for this proposition solely on the CIT's decision below, which cited no supporting authority, conflicting with the familiar proposition that even constitutional claims generally can be presented to an administrative agency in the first instance.[23] As the court of appeals explained, there is no logical reason to permit refunds of "[e]rroneous overpayments . . . due to miscalculations," but deny refunds for a constitutional defect. Pet. App. 22a.

3. As discussed in section I.A., *supra*, the jurisdictional theory presented in this case was neither briefed nor argued to this Court in *U.S. Shoe*. Summary reversal is usually reserved "for situations in which the law is well-settled and stable, the facts are not in dispute, and the decision below is clearly in error."[24] Even if the Court were to consider the issues raised by this case important enough to warrant review, there is no basis for the Court to decide the case without full briefing and argument.

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[23] *See Thunder Basin Coal*, 510 U.S. at 215 (constitutional challenge to Federal Mine Safety Act must be presented first to the agency and then to the court of appeals, pursuant to statutory review scheme); *Weinberger v. Salfi*, 422 U.S. at 762-65 (constitutional challenges to denial of Social Security benefits must be presented first to the agency, which renders a judicially reviewable "decision" even when it resolves a case by determining that it has no authority to decide a constitutional question); *see also Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938) (exhaustion repeatedly required "where, as here, the contention is made that the administrative body lacked power over the subject matter").

[24] *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

II. THE PETITION DOES NOT RAISE AN IMPORTANT, RECURRING ISSUE, BUT INSTEAD CONCERNS THE ADMINISTRATIVE DETAILS OF REFUNDING A DEFUNCT TAX

The government does not support its assertion that "[e]ven outside the context of the Harbor Maintenance Tax, the question presented in this case has substantial recurring importance for the routine administration of the customs laws." Pet. 6. The government contradicts its own statements to this Court three years ago in *U.S. Shoe*, when it expressly declined to seek review of the basis of the CIT's jurisdiction: "This jurisdictional issue is . . . peculiar to the refund requests of exporters under the Harbor Maintenance Tax and lacks recurring application in other contexts." Pet. for Writ of Cert. at 7 n.2, *U.S. Shoe*. The jurisdictional basis for HMT refunds has not grown any less "peculiar" or any more "recurring" since the tax to which it relates has been declared unconstitutional, but rather precisely the opposite.

1. This case does not represent a new development in customs law. It merely involves a straightforward application of the protest statute, 19 U.S.C. § 1514, to decisions under the refund request portion of the HMT regulation, 19 C.F.R. § 24.24. As the court of appeals explained, the proposition that the denial of a request for refund from Customs is a protestable decision has been well established for the past fifty years. Pet. App. 18a (citing *Eurasia Import v. United States*, 31 C.C.P.A. 202, 211-12 (1944)). This case thus breaks no new ground in that regard.

2. The universe of possible cases affected by the decision below is limited. The HMT on exports has been held unconstitutional, the regulations relating to its collection have been repealed, and the tax is no longer being collected. *See supra* at 2 n.1. The vast majority of Customs duties, charges and exactions involve *imports*, as to which the jurisdictional basis for CIT review is well established. Pet. App.

21a. In contrast, the refund request procedure at issue in this case is unique to the HMT on exports and on domestic shipments. Nor are export taxes likely to be collected in other contexts; such taxes are unconstitutional. Thus, once the refunds of HMT have been distributed, no new cases can arise.

3. The court of appeals did not, as the government seems to suggest, create a sweeping rule that would allow litigants to select jurisdiction so as to evade statutes of limitations at will. Rather, the court of appeals' narrow and fact-bound jurisdictional holding is limited to the specific context of the HMT on exports.

The decision below does not give taxpayers an ability to elect their own statutes of limitations. Nothing in *U.S. Shoe* or the decision below abrogates the principle that a taxpayer must exhaust its administrative remedies unless a court, in its discretion, waives exhaustion. Taken in context with this case, *U.S. Shoe* may best be read as having waived the exhaustion requirement in what the court below correctly noted to be an atmosphere of procedural confusion in which the constitutional challenges to HMT arose. Pet. App. 13a-14a, 22a.[25] It would be quite extraordinary to read *U.S. Shoe* as having decided—without the issue having been raised, much less briefed or argued—that parties *cannot* rely on

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[25] As the court of appeals recognized, "there was much confusion in Customs and among exporters as to the proper procedure for challenging the constitutionality of the HMT as applied to exports." Pet. App. 13a. Thousands of challenges to the HMT were filed within a short period of time, in the CIT, in the Court of Federal Claims, and even in district court. The Customs Service itself promulgated a misleading Federal Register notice, incorrectly instructing exporters that they must file protests within ninety days of payment of HMT. Pet. App. 5a, 13a-14a. Thus, the court of appeals recognized that at the time of the *U.S. Shoe* litigation, "there was not one obvious jurisdictional basis that this court could have required the *U.S. Shoe* plaintiff to use." Pet. App. 14a.

agency regulations to exhaust their administrative remedies, as Swisher did here, and therefore *must* claim refunds by proceeding directly to Court. The logical extension of the government's argument would be that the Court in *U.S. Shoe* intended to deny other taxpayers the right to exhaust the administrative remedies specifically provided in Customs regulations.

Congress did not impose a limitations period for requesting refunds of HMT, and the Customs Service did not establish one in its refund request regulation, 19 C.F.R. § 24.24. If the absence of a limitations period for requesting refunds of HMT were considered to be anomalous, Congress and the Customs Service have the power to provide one without intervention by the Court. As the court below recognized, "Customs was free to impose time limits on the filing of HMT refund requests," and it "remains free to alter the regulation to impose a time limit in the future." Pet. App. 21a-22a.

Finally, the decision below does not create any "confusion in the law," as the government claims. Pet. 20. The Federal Circuit's most recent decision concerning the details of implementing HMT refunds, *Stone Container Corp. v. United States*, had no trouble reconciling the availability of review under the procedures outlined in *U.S. Shoe* and in this case.[26]

4. The total amount of money at stake, which the government estimates as being at most $500 million (Pet. 6), also does not justify review by this Court. This case does not raise any new exposure to the public fisc. The only question here is the degree to which refunds already mandated by the

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[26] Nos. 99-1333, 99-1334, 2000 WL 1514376 (Fed. Cir. Oct. 12, 2000).

holding of *U.S. Shoe* will be limited on jurisdictional, and hence statute of limitations, grounds.

The cases the government cites for the proposition that certiorari is appropriate for "decisions of significant fiscal and administrative importance" are readily distinguishable. *See* Pet. 14. Several cases cited in the petition involved recurring issues under the Internal Revenue Code.[27] None of those cases involved a tax that was no longer being collected. The other case cited, *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), presented the recurring issue whether *Chevron* deference applies to Customs Service regulations. Indeed, the constitutional question in *U.S. Shoe*, and the broad issues of administrative law involved in the other customs matters in which the Court has granted certiorari in recent Terms—*Haggar* and *United States v. Mead Corporation*[28]—contrast sharply with the unique, fact-bound jurisdictional issue here. *Haggar* and *Mead* involve fundamental issues of administrative law that recur in virtually every Customs Service decision, and that implicate the workings of other agencies as well; by contrast, this case involves the jurisdictional basis for issuing a finite number of refunds of a defunct tax.

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[27] *See United States v. Hill*, 506 U.S. 546 (1993) (whether adjusted basis includes certain depreciable drilling and development costs); *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989) (whether "accumulated profits" in the indirect tax credit provision of the Internal Revenue Code are to be measured in accordance with United States or foreign tax principles); *United States v. American Bar Endowment*, 477 U.S. 105 (1986) (treatment of tax exempt organization's income derived from offering group insurance to its members).

[28] No. 99-1434 (oral argument scheduled November 8, 2000) (whether Customs Service classification decisions are entitled to *Chevron* deference).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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